No. 14327

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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CITATIONS

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing an action by the Secretary of Labor,[1] United States Department of Labor, filed under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.), 201 *et seq.*, to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act.[2]

[1] By order of the District Court entered October 15, 1953 (R. 51), James P. Mitchell, Secretary of Labor, was substituted for Martin P. Durkin, resigned.

[2] The pertinent statutory provisions are printed in full in the Appendix, *infra*, p. 38.

After a full hearing, the court made "Findings of Fact and Conclusions of Law" (R. 52–74), and entered final judgment on January 18, 1954 (R. 76). Notice of Appeal to this court was filed on March 18, 1954 (R. 77).

As set forth in the complaint (R. 3), the district court had jurisdiction under Section 17 of the Act and 28 U. S. C. Sections 1337 and 1345. This court has jurisdiction to determine the appeal under 28 U. S. C. Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

The complaint (R. 3–7) alleges violations of the Act's overtime and record-keeping provisions. The only question raised by this appeal is whether, in providing meals and lodging to the employees of the Anaconda Company's Darwin mine admittedly engaged in the production of goods for commerce (Stip. R. 15–16), appellee's employees are themselves engaged in such production within the meaning of the Fair Labor Standards Act. Appellee also contended in the court below that its employees were exempt from the requirements of the Act by virtue of the exemptions provided by Sections 13 (a) (1) and 13 (a) (2) (Stip. R. 30, 31). However, the court below limited its factual findings to the coverage issue (Findings and Conclusions R. 52–74). Thus, while appellee's Designation of Additional Parts of the Record indicates an intention to present to this Court the issues concerning the applicability of the exemptions, we do not believe that these issues are presented for decision on this appeal.

Appellees operate three establishments providing dining and lodging facilities in various localities in California, each under contract with a commercial company. The main office is in West Los Angeles, California. The employees here involved are employed by appellees in operating the messhall, bunkhouse and commissary facilities owned by the Anaconda Copper Mining Company and located on certain of its property at its Darwin mine (Fdg. 1, R. 53). These facilities accommodate employees of Anaconda engaged in the mining and milling of lead, silver and zinc ores, which ores are regularly shipped in interstate commerce (Stip., R. 15, 16).

Approximately 11 employees of appellees are regularly employed in the operation of the messhall, bunkhouse, and commissary in such occupations as cooks, dishwashers, waiters and janitors (Fdgs. 1 and 17, R. 53, 66). The parties agree that the commissary clerk is not within the coverage of the Act and that the manager of the facilities is within the exemption provided by Section 13 (a) (1) of the Act (Fdg. 17, R. 66). The janitors, waiters and wishwashers receive $40.25 per week; the second cook receives $61.46 a week, and the Chef receives $90.93 per week. In addition, all employees are furnished free board and lodging (Fdg. 17, R. 66–68). The employees normally work 56 hours per week. While they indicate on a daily time record sheet the days upon which they report for work, no specific record of hours worked as such is maintained (Fdg. 13, R. 63). All pay is computed on the basis of the number of days worked during the payroll period (Fdg. 14, R. 63).

The Darwin mine is located in a remote and isolated area in the Inyo Mountains near Death Valley, California (Plaintiff's Exhibit Z, R. 50).[3] There are no eating and lodging facilities at the mine other than those maintained by appellees who hold an exclusive franchise to furnish such services (Plf. Exh. B, R. 41). Nor are there any other living facilities in the vicinity at which these employees might be accommodated. The nearest town which could possibly approximate their needs is Lone Pine, located approximately 38 miles from the mine (Fdg. 11, R. 62, 63). While the town of Darwin, population 125, is one mile from the mine, its facilities could hardly be considered adequate for this purpose. This village contains a service station, a grocery store, a post office and two eating establishments. One of the eating establishments, the Darwin Café, is closed on Thursday and is never open for business before 10:00 a. m. While at the time the stipulation was entered into this establishment served such items as steak and bacon and eggs (Fdg. 7, R. 59, 60), on cross-examination of Mr. Fred Tong, general manager of the Darwin mine, it was revealed that it is now under a new management which confines itself to serving ham sandwiches and chili while the refreshment bar is open (R. 147). The number of persons which can be accommodated at one time is extremely limited (Plf. Exhs. H and I).[4] The other restaurant,

[3] Abbreviated hereinafter as "Plf. Exh."

[4] By stipulation of the parties and order of this Court it was agreed that the photographic exhibits of record may be referred to in their original form and that the Court dispense with their reproduction in the printed record.

known as Crosson's, sells hamburgers, chili and beans, sandwiches, and similar items. This establishment contains a counter, six or seven stools and two tables (Fdg. 7, R. 59, 60). The towns of Keeler (Fdg. 9, R. 62), population 150, Panamint Springs (Fdg. 10, R. 62), population 12, and Olancha (Fdg. 8, R. 61), population 200, located at distances of 23, 23, and 34 miles respectively, likewise obviously lack facilities with which to accommodate the miners.

No public transportation facilities are available between the Anaconda mine and any of the surrounding communities; the chief mode of transportation being by private automobile. While a contract carrier of ore operates runs between the town of Lone Pine, the other communities, and the mine, only two additional persons may ride in the cab with the driver (Fdg. 6, R. 58, 59).

The Government offered the testimony of two "underground" Anaconda employees which further attested to the remoteness of the Anaconda mine and the resulting essentiality of appellee's facilities to its operation. Thus, Mr. Kenneth Dodd stated unequivocally "I couldn't possibly be an employee for Anaconda without the bunkhouse" (R. 91). Mr. Paul Allen's testimony was to the same effect. He testified that he utilized appellees' facilities simply because there were no other available rooming houses or restaurants nearby (R. 94, 95). That there were no other adequate facilities available was also indicated by the testimony of Mr. Charles Snyder, an Anaconda employee called on behalf of appellee, who, after admitting that

he did not know of any available living facilities, stated if pressed "* * * I believe I might be able to set up a wigwam or teepee" (R. 112).

Prior to November 1, 1945, the facilities here involved were operated by the Anaconda Co. (Fdg. 2, R. 54). On that date a "subsistence agreement" was entered into between Anaconda and appellees, as successful bidders, providing for the operation of these facilities by appellees. On October 1, 1946, a further agreement was entered into which, with one amendment (Fdg. 2, R. 54), is still in effect (Fdg. 4, R. 57). It is clear that under the terms of the agreement, the Anaconda Company has retained effective control over the operation of the facilities and that they are closely integrated with the production of the mine. Thus, it stipulates the charges to be made for board and lodging and requires the operator to serve wholesome daily meals as directed by the Company. Meals are paid for by means of payroll deductions (Plf. Exh. B, R. 42). Employee grievances or dissatisfaction as to the food served are taken up with Anaconda, not with appellees (R. 96, 97, 98). The contract contains certain provisions designed to protect Anaconda, including a requirement that the operator procure liability insurance covering the Anaconda Company as well as appellees (Plf. Exh. B, R. 45). Appellees are granted the exclusive privilege of conducting "subsistence operations" at the Darwin mine during the continuance of the agreement which may be terminated upon 30 days' written notice by either party (Plf. Exh. B, R. 41). The facilities, including the messhall, bunkhouse, commissary, light, heat, fuel,

telephone service, etc., are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. Appellees are guaranteed a gross profit of $750 each and every month (exclusive of overhead charges attributable to this operation incurred by appellees' home office in Los Angeles) (Plf. Exhs. A and B, R. 32–37, 38–48). The cost to Anaconda has averaged approximately $0.30 per meal (Fdg. 16, R. 64–65).

Of the 236 persons employed by Anaconda, an average of 62 (or almost 26 percent) reside in the bunkhouse and 49 (or almost 20 percent) regularly avail themselves of the messhall facilities (Fdg. 3, R. 55, 56). In addition, men who do not reside at the bunkhouse are occasionally served at the messhall (Fdg. 3, R. 56). Approximately half of Anaconda's 126 miners and underground workers live in the bunkhouse (R. 140), the use of which is limited to male employees of Anaconda who are either single or whose families reside outside the Anaconda area (Fdg. 5, R. 58). While the Anaconda Company also owns some houses and trailers which it rents to employees, these are, in the main, occupied by the mill workers who are generally family men and whose employment, unlike that of the miners, is of a stable nature (R. 140).

That the operation of appellees' facilities is closely integrated with the production operations of the mine is indicated by the fact that meal times are adjusted principally to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis

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and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees working in the mine who cannot practically leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57). Indeed, a sign on one of the access roads to the Anaconda properties warns "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86). Of significance also is the fact that in its help-wanted advertising for mill men and miners, Anaconda makes a point of noting that "good bunkhouse accommodations" are available (Plf. Exh. AA, R. 51) which admittedly are an inducement in securing employees (R. 128, 129).

The trial court made no findings with respect to appellees' claim of exemption as a retail establishment under Section 13 (a) (2) of the Act. Appellee introduced only one witness, Mr. Arnim Kussurum, Secretary of the National Restaurant Association on this issue. Mr. Kussurum testified that the Anderson operation falls within the Association's definition of "restaurant" as defined in the Association's bylaws; that establishments such as appellees' qualify for membership in the Association, and that "in the restaurant industry a retail sale is a sale or service of a meal to the consumer, and generally consumed on the

premises of the establishment" (R. 154). Under this definition he stated that the function performed by the Anderson facility would be considered retail sales or services (R. 156). It was brought out on cross-examination that in addition to his duties as secretary, Mr. Kussurum also acts as the Association's general counsel and had corresponded with appellees in connection with the instant case (R. 156).

On the basis of "expert" testimony introduced by appellees (R. 114–139) the trial court made findings that persons employed in mining operations will live in communities at a distance of 30 or 40 miles from their places of work and will commute daily by automobile, bus, or other means of transportation; that abandonment or curtailment of facilities similar to those operated by appellees by mining companies situated like the Anaconda mine did not affect either the production of the mine or availability of employees; that children of persons employed at Anaconda attend high school in Lone Pine, commuting daily by bus; and that employees frequently will leave appellees' facilities and obtain their lodging and their meals elsewhere without affecting their employment with Anaconda. The court further speculated that should the facilities in question be abandoned or curtailed entirely, there would be only a temporary inconvenience to the operation of the mine and the effect upon production at the mine would be insubstantial even during this temporary period with no significant effect upon total shipments, particularly in view of the stocks of ore that are kept in reserve. The court concluded that appellees' facilities are maintained for

Anaconda employees as a convenience only. The court also speculated that if the curtailment or abandonment of these facilities compelled as many as one-half of the employees utilizing these facilities to leave their jobs, that such employees would obtain meals and lodging in the homes of other employees and in surrounding communities which "would in all probability respond to an increased demand" (Fdgs. 18–27, R. 68–73). The court concluded that none of appellees' employees were engaged in commerce, the production of goods for commerce, or in any closely related process or occupation directly essential to such production within the meaning of the Fair Labor Standards Act (R. 73–74). Accordingly, the court denied appellant's prayer for injunction and dismissed the complaint (R. 75).

SPECIFICATION OF ERRORS

1. The trial court erred in making Findings of Fact Nos. 19, 20, 21, 22, 23, 24 and 25 (R. 68–73) to the effect that appellees' facilities are not remote and isolated, that food and lodging can be obtained elsewhere in the vicinity, and that abandonment of the facilities would result only in a temporary inconvenience to the mine rather than substantially affecting its production.

2. The trial court erred in making Conclusions of Law Nos. 1, 2, 3 and 4 (R. 73, 74) to the effect that appellees' employees are not engaged in activities which are closely related and directly essential to the production of goods for commerce within the meaning of Section 3 (j) of the Act.

3. The lower court erred in failing to find as a fact that, in providing meals and lodging to employees of the Anaconda Copper Mining Company's Darwin mine admittedly engaged in the production of goods for commerce, appellees' employees are themselves engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The lower court erred in failing to conclude as a matter of law, that appellees' employees are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

5. The lower court erred in failing to conclude, as a matter of law, that appellees have violated, and are violating, the overtime compensation and record-keeping provisions of the Fair Labor Standards Act with respect to employees employed by them in operation of the Anaconda Copper Mining Company's Darwin mine eating and lodging facilities.

6. The lower court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

SUMMARY OF ARGUMENT

The holding of the court below that the Anaconda Company's Darwin mine is not sufficiently remote and isolated to bring appellees' employees engaged in the feeding and lodging operations at the mine within the coverage of the Act is erroneous and not sustained by the record. The stipulated facts indicate that the Darwin mine is located near Death Valley in one of the most remote and isolated parts of the country.

The nearest lodging and eating facilities which could possibly accommodate adequately the needs of the miners is located some 38 miles away from the mine. The trial court theorized, however, that were appellees' facilities to shut down, the surrounding communities would expand their facilities to meet the needs of the miners. This Court expressly rejected a similar argument in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107 stating "* * * it is not what could have been the fact, but what actually was the fact, upon which the decision must rest." It then held, on the basis of a factual situation closely paralleling that of the instant case, that employees of the cookhouses serving the loggers were within the coverage of the Act. To the same effect is the Eighth Circuit's decision in *Hanson v. Lagerstrom,* 133 F. 2d 120.

The only distinction which might be drawn between the instant case and the *Womack* case is that in *Womack* the cookhouses were operated by the employer of the logging crews whereas here the facilities are provided through an independent contractor. But this distinction is immaterial since as the decisions of this Court and of the Supreme Court have repeatedly held, the applicability of Sections 6 and 7 of the Act depends on the type of work of the individual employee rather than on the business of his employer. See *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125;

Kam Koon Wan v. *E. E. Black, Limited,* 188 F. 2d 558 (C. A. 9), certiorari denied, 342 U. S. 826.

That the test of coverage under Section 3 (j) of the Act is not whether the work of the employees is indispensable to production was only recently stated by this Court in *General Electric Co.* v. *Porter,* 208 F. 2d 805 certiorari denied, 347 U. S. 951, holding the Act applicable to firemen employed by the General Electric Company to protect a community in which company employees lived. The work of the employees in the instant case engaged in providing essential living facilities for the miners is just as closely related and directly essential to production as the work of the firemen in the *General Electric Co.* case.

That the *Womack* and *Hanson* cases, and the case of *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, upon which those decisions relied, are still controlling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments of the Act.

Section 3 (j) as amended in 1949 (printed in full in the Appendix, *infra,* p. 38), provides that an employee shall be deemed engaged in the production of goods "if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof* * * *." The italicized words were substituted for the phrase formerly contained in this section "or in any process or occupation necessary to the production thereof * * *."

In *Hawkins* v. *E. I. du Pont de Nemours & Co.,* 192 F. 2d 294 (C. A. 4), the only court of appeals decision interpreting the amended language of the Act in connection with employees of industrial feeding facilities, the Fourth Circuit held the Act applicable to employees of a cafeteria located in a plant engaged in the production of goods for commerce, analogizing the situation to that of the isolated lumber and mining camps.

See also *Tobin* v. *Promersberger,* 104 F. Supp. 314 (D. Minn., 1952); *Tobin* v. *Cherry River Boom & Lumber Co.,* 102 F. Supp. 763 (S. D. West Virginia, 1952); *Broach* v. *McPherson,* 248 S. W. 2d 355 (S. Ct. of Arkansas, 1952); *Tobin* v. *Union Nat. Bank of Little Rock,* 207 F. 2d 848 (C. A. 8).

The legislative history of the amended Section 3 (j) specifically indicates that the change in the definition of produced was not intended to exclude from the Act cookhouse employees of the type involved in the *Womack* and *Hanson* cases. This is made clear (1) by rejection of the word "indispensable" as being too restrictive (95 Cong. Rec. 14874, October 18, 1949; 95 Cong. Rec. 14936, October 18, 1949), (2) by express approval of the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees (95 Cong. Rec. 14874, October 18, 1949); (3) by the choice of language virtually identical to the Supreme Court's language in *Kirschbaum* (95 Cong. Rec. 14874, October 18, 1949), and (4) by statements in both branches expressly approving the *Kirschbaum* case

(95 Cong. Rec. 14929, October 18, 1949, 95 Cong. Rec. 14874–5, October 18, 1949).

Nor is it material under the amendments that services such as these are provided through an independent contractor. For the legislative reports on the amendments clearly state that the work of these employees "* * * will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce." (95 Cong. Rec. 14929, October 18, 1949; see also 95 Cong. Rec. 14874–5, October 18, 1949).

ARGUMENT

Appellees' employees employed in the operation of the messhall and lodging facilities for the employees at Anaconda Company's Darwin mine are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act

Employees of the Anaconda Company at the Darwin mine are indisputably engaged in the mining and milling of lead, silver and zinc ores which are regularly shipped in interstate commerce (Stip., R. 15, 16). While appellees apparently concede this much, they dispute the applicability of the Act to their own employees who are engaged in providing essential board and lodging facilities for employees at the mine (Stip., R. 30).[5] It is the Government's contention that Sec-

[5] There is no disputed issue concerning non-compliance with the requirements of the Act. Though the answer (R. 12, 13) denies generally paragraphs V, VI, and VII of the complaint alleging failure to maintain proper records and to pay proper overtime compensation to employees engaged in the production of goods for commerce, it is plain from the stipulated pre-

tion 3 (j), which defines "produced" to include employees engaged in "any closely related process or occupation directly essential to the production" of goods, as well as those performing enumerated activities on the goods themselves, embraces the employees here involved.

This Court's decision in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, (C. A. 9) together with the Supreme Court's decision in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and the Fourth Circuit's decision in *Hawkins* v. *E. I. du Pont de Nemours & Co.,* 192 F. 2d 294, decided subsequent to the recent amendments to the Act are controlling here. The *Womack* case is indistinguishable from the instant case in fundamental facts and basic principle. Defendant there maintained two cookhouses, one of which was located in an isolated logging camp about 17 miles from the company's headquarters at Glenwood, Oregon, and the other was situated at defendant's headquarters in Glenwood. There, as in the case of the messhall

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trial conference order that appellees' denial went only to the allegations of coverage since the pretrial order specifies the coverage and exemption issues but does not list any issue as to whether proper records were maintained or whether the employees were properly paid. In any event appellees admit that no specific record of hours worked is maintained as required by the regulations issued by the Administrator, 29 CFR, 1953 supp., 516 pursuant to the authority conferred upon him by Section 11 (c) of the Act (Stip. 13, R. 25). Furthermore, the facts show a customary 56-hour workweek for an agreed salary based on a daily wage without the slightest suggestion of extra pay for overtime (Fdgs. 13 and 14, R. 63). That the Act requires more for the employees to whom it applies in such situations is clear from the decisions in *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572 and *Walling* v. *Helmerich and Payne*, 323 U. S. 37.

and lodging facilities here, the cookhouses were maintained primarily for the purpose of serving employees engaged in the production of goods for commerce. In a suit by the Cookees at the two cookhouses for unpaid overtime compensation, defendant contended that the employees were not covered by the Act. Rejecting defendant's contention that the cookhouse employees were not necessary to the production of timber for commerce, this Court said (*id.* at 105):

> The employees * * * were actually assisting the work of the loggers by keeping their board close to their place of work, thus rendering it easier (perhaps, even possible) for Consolidated to maintain a proper organization of its loggers and forwarding their work by furnishing the food whereby the men were given the strength to pursue their labors. And, in our determination, we find ourselves well within the limitations—the lines drawn—in * * * Kirschbaum v. Walling.

The only distinction which might be drawn between this case and the *Womack* case is that in *Womack* the cookhouses were operated by the employer of the logging crews whereas here the facilities are provided through an independent contractor. But this distinction is plainly immaterial since the applicability of Sections 6 and 7 of the Act depends on the type of work of the individual employee rather than on the business of his employer. Thus, in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, the Supreme Court held the Act applicable to employees engaged in the maintenance and operation of a building, because its ten-

ants were engaged in the production of goods for commerce, stating:

> * * * The petitioners assert, however, that the building industry of which they are a part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities (*id.* at 524).

And in *Tipton* v. *Bearl Sprott Co.*, 175 F. 2d 432 (C. A. 9), a case involving employees of an independent contractor employed in the operation of a cafeteria located in a steel company, this Court recognized this well-settled principle, stating:

> In order to state a claim against appellees upon which relief could be granted, it was not necessary to allege that appellees, or any of them, were engaged in the production of goods for commerce; for the applicability of § 7 (a) of the Act, 29 U. S. C. A. § 207 (a), is determined, not by the nature of the employer's business, but by the character of the employee's activities * * * (*id.* at 435).

While upon remand the district court rendered a decision in favor of the defendants dismissing the complaint (*Tipton* v. *Bearl Sprott Co.*, 93 F. Supp. 496), the facts upon which that decision turned are clearly distinguishable from those in the instant case. There, in striking contrast to the remoteness of the lodging and dining facilities in the instant case, the steel company in which the in-plant feeding opera-

tions were carried on, was located in the main downtown central business and shopping district of the City of Torrance, Los Angeles County, in the midst of the most crowded and active business center of the city. The City of Torrance contained 23 restaurants, of which more than two-thirds were within a quarter of a mile of an entrance to the steel plant. While it is true that the district court in the *Tipton* case also attached some significance to the fact that the cafeteria was operated by an independent contractor, clearly it regarded this as only one element to be considered in conjunction with all the other facts in determining whether the test set forth in *Armour & Co.* v. *Wontock,* 323 U. S. 126, rehearing denied 323 U. S. 818, was met, i. e. whether the employment is "part of an integrated effort for the production of goods" for commerce, 323 U. S. at 130.

In the instant case the integration of the lodging and feeding facilities with Anaconda's mining operations is immediately evident from the fact that prior to 1945 Anaconda operated these facilities itself and from the fact of appellees' contract with the Anaconda Company under which it retains effective control over these operations. Thus, under the terms of the "subsistence agreement" the mess hall, bunkhouse, commissary and light, heat, fuel and telephone service are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. Appellees are guaranteed a gross profit of $750 each month (Plf. Exhs. A and B, R. 32–37, 38–48). The cost to Anaconda has averaged approxi-

mately $0.30 per meal (Fdg. 16, R. 64, 65). The terms of the "subsistence agreement" further stipulate the charge to be made for board and lodging and require the operator to serve wholesome daily meals as directed by the Company (Plf. Exh. B, R. 42). Meals are paid for by means of payroll deductions (Plf. Exh. B, R. 42). Employee grievances or dissatisfaction as to the food served are taken up with Anaconda rather than with appellees (R. 96–98).

This Court's continued recognition that coverage under the Act is dependent upon the character of the employees' activities, and not upon the nature of the employer's business, is evident from its more recent decision in *Kam Koon Wan* v. *E. E. Black, Limited*, 188 F. 2d 558, certiorari denied, 342 U. S. 826 (decided April 13, 1951, i. e. subsequent to the district court's decision in *Tipton* v. *Bearl Sprott Co.* which was decided in October, 1950). The decisions of the Supreme Court and other courts of appeal to this effect are so numerous[6] as to require no further comment.

The trial court's conclusion in the instant case that adequate housing and eating facilities were presently

[6] *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 at 132; *McLeod* v. *Threlkeld*, 319 U. S. 491 at 497; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, at 184–185; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, 1014; *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773, at 775; *Wilson* v. *Reconstruction Finance Corporation*, 158 F. 2d 564 at 565, certiorari denied, 331 U. S. 810; *Walling* v. *Sondock*, 132 F. 2d 77 at 78, certiorari denied, 318 U. S. 772; *Phillips* v. *Graham Aviation Co.*, 157 F. 2d 443 at 444; *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 at 752; *Swift & Co.* v. *Wilkinson*, 124 F. 2d 176 at 176–177; *Jax Beer Co.* v. *Redfern*, 124 F. 2d. 172 at 174.

available within a reasonable distance of the mine and that appellees' facilities are not sufficiently remote and isolated to bring their employees within the coverage of the Act (Fdg. 20, R. 69) is conclusively contradicted by the stipulated facts and by its own findings. The nearest town, Darwin, with a population of 125, is located about one mile from the mine. While there are two eating establishments in Darwin, it is evident that neither of these operate facilities adequate for feeding the miners. The Darwin Café is closed on Thursday and is never open for business before 10:00 a. m. (Fdg. 7, R. 59, 60). The number of persons which this establishment can accommodate at one time is obviously limited far below the requirements of the miners (Plfs. Exhs. H and I). And while at the time the stipulation was entered into this establishment served such items as steak and bacon and eggs (Fdg. 7, R. 59, 60), on cross-examination of Mr. Fred Tong, general manager of the Darwin mine, it was revealed that it is now under a new management which confines its operations to serving ham sandwiches and chili while the refreshment bar is open (R. 147).

The only other eating establishment in Darwin, known as Crossons, limits itself to selling such items as hamburgers, chili and beans, and sandwiches, obviously not adequate fare for miners. It contains a counter, six or seven stools and two tables (Fdg. 7, R. 59, 60). The nearest lodging accommodations consist of a motel in Panamint Springs, a distance of 23 miles from the mine. The per day rate for accommodations is $4.00 single and $5.50 double (Fdg. 10, R. 62)

which would certainly preclude the ordinary miner from making the motel his home. Under these circumstances the following statement by this Court in the *Womack* case (132 F. 2d at 107) would seem particularly apt here:

> * * * The argument that because the Glenwood cookhouse is situated in a village wherein is also located a lunch counter or fountain equipped with a half dozen stools, serving sandwiches and coffee, is not persuasive. No such establishment could supply the necessary meals required by several hundred hungry laborers.

And in the *Womack* case, the cookhouse was no more remote and isolated than are appellees' facilities here. There, as here, employees of the Company were not compelled to take their meals at the messhall, and there the trial court had found that the greater proportion of the Company employees took their meals elsewhere than at the Glenwood cookhouse. Many of these employees lived in Glenwood and ate at home. In the instant case there are no eating and lodging facilities at the mine other than those maintained by appellees who hold an exclusive franchise to furnish such services (Plf. Exh. B, R. 41).

Similarly, in *McComb* v. *Row River Lumber Company* (not officially reported), 8 WH Cases 403, (D. Ore., 1948) affirmed in a per curiam opinion by this Court at 180 F. 2d 356, the court, although dismissing the complaint on other grounds, held a cook and a kitchen helper to be within the coverage of the Act where employed at a lumber camp located only 13 miles from the town of Cottage Grove, Oregon, which

contained public eating places. There the Company employed an average of 167 employees in its lumbering operations, and a monthly average of 53 of these employees availed themselves of the cookhouse. There also the Company paid the cook a subsidy for each meal served; the purpose of which, as found by the trial court, was to offer reasonably priced meals as an inducement to attract and retain employees to work at its mill (8 WH Cases 404).

An average of 62 (or approximately 26 percent) of the 236 persons employed by Anaconda reside in appellees' bunkhouse and an average of 49 (or about 20 percent) regularly avail themselves of the messhall facilities (Fdg. 3, R. 56). Of especial importance here is the fact that approximately 50 percent of Anaconda's 126 miners and underground workers live in these facilities (R. 140) . The nearest town containing appropriate facilities is Lone Pine which is located about 38 miles from Darwin. The trial court, however, cited instances where persons have lived 30 or 40 miles from their place of work and theorized that if appellees abandoned the facilities in question, restaurants in Darwin would expand their facilities to meet the increased demand (Fdg. 20, R. 69; R. 164). But a similar argument was advanced in the *Womack* case where the Company urged that it could have employed loggers in the vicinity which would have obviated the necessity of providing a cookhouse. This Court made short shrift of that argument by stating "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest" (132 F. 2d at 107). Similarly, in *Hanson* v.

Lagerstrom, 133 F. 2d 120, the Eighth Circuit held the Act applicable to a cookhouse employee at a logging camp although located only 13 miles from the towns of Little Falls and Big Falls, Minnesota, whose eating and lodging facilities might have been adequate for the needs of loggers. Said the court (at p. 122):

> The proximity of hotels at Little Falls and Big Falls, Minnesota, the presence of a highway running past the camp within 150 feet, and other roads kept open the year around, with many men owning cars of their own, are cited as indicating the non-essential character of the cook house. It is also said that the cost of production is the same whether the camp method is used or farmers and shackers are hired. But these suggestions are aside from the question. The fact that defendant might have employed other methods, thus avoiding the necessity of maintaining a cook house, is not important. We are here "confronted with a condition and not a theory." We must confine our consideration to what was actually done and not to what might have been done.

The basis for holding coverage of the cookhouse employees in both the *Womack* and *Hanson* cases was that such employment plainly falls within the criteria established by the Supreme Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517. In that case the Act was held applicable to maintenance workers employed by the owner of a loft building tenanted by manufacturers producing goods for commerce. Rejecting the criterion of physical contact with the goods as the touchstone of coverage, the Court ruled that unless the

employee's activity has "only the most tenuous relation" to production, coverage may not be denied (*id.* at 525).

Unless economic realities are to be ignored, appellees' employees here are no less important to the Anaconda mining operations than were Kirschbaum's maintenance employees to the garment manufacturing conducted in its building. The operation of lodging and messhall facilities such as those of appellees plays a significant, integral part in the successful operation of mining camps. That camp conditions, particularly satisfactory living accommodations are an important factor in attracting and retaining an adequate supply of labor, is underscored by Anaconda's own advertisement for recruiting mill men and miners which makes a particular point of noting that "good bunkhouse accommodations" are available (Plf. Exh. AA, R. 51) and the fact that it subsidizes the operation of these facilities (Fdg. 16, R. 64, 65). And appellees' expert witness testified that the availability of such accommodations obviously provides a stronger likelihood that Anaconda would obtain employees (R. 128, 129).

In view of the circumstances of this case it would appear that the lower court adopted the test that coverage under Section 3 (j) depends upon whether the employment is indispensable to production. But this Court expressly refuted this test in its recent decision in *General Electric Co.* v. *Porter,* 208 F. 2d 805 certiorari denied 347 U. S. 951, a case involving the employment of firemen by the General Electric

Company to protect a community in which company employees resided, stating:

> The employees' work need not be indispensable to production * * *. It may be argued that the communities were not indispensable to plant operation. Yet they serve a valuable function and in the event they were destroyed by fire the smooth functioning of the plant would be interrupted. (208 F. 2d at 809–810, 811).

The furnishing of board and lodging facilities in the instant case is just as closely related and directly essential to production as the furnishing of firemen to guard the community in that case.

Thus, it is clear that the instant case is indistinguishable from the *Womack* and *Hanson* cases. Though the operation of the lodging and messhall facilities here was conducted by an independent contractor, the above Supreme Court and appellate court decisions, together with the fact that the courts in the *Womack* and *Hanson* cases expressly relied on *Kirschbaum,* establish that that factor is not material.

That the *Womack, Hanson* and *Kirschbaum* cases are still controlling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments to the Act. And the court decisions since the amendments recognize and confirm their continued authoritative effect.

Section 3 (j) as amended in 1949 (printed in full in the Appendix, *infra,* p. 38), provides that an employee shall be deemed engaged in the production of

goods "if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof* * * *." The italicized words were substituted for the phrase formerly contained in this section "or in any process or occupation necessary to the production thereof * * *."

The only court of appeals decision interpreting the amended language of the Act in connection with the furnishing of food to employees engaged in the production of goods for commerce is found in *Hawkins* v. *E. I. du Pont de Nemours & Co.,* 192 F. 2d 294 (C. A. 4, 1951). There the Fourth Circuit held the Act applicable to employees of a cafeteria located in a plant engaged in the production of goods for commerce where the cafeteria was the only available place for employees to eat. The court analogized this situation to that of the isolated mining or lumber camp in *Womack,* stating:

> * * * But we find no substantial distinction between the conditions surrounding the cafeteria workers in the defendant's plant and those relating to cooks and similar workers in isolated mining or lumber camps mentioned in the bulletin. All of the employees of the defendant were confined to the plant under guard during their working hours, and hence it may fairly be said that the activities of the cafeteria employees were closely related and directly essential to the production of merchandise (*id.* at 297).

That the Fourth Circuit correctly decided that the 1949 amendments did not revoke the principles of the *Womack, Hanson* and *Kirschbaum* cases is clear for the legislative history of the amended Section 3 (j) plainly shows that the change was not designed to cause any severe restriction of the scope of the Act as previously construed by the courts, but, rather "to provide a more specific guide than does the word 'necessary' " to prevent extension of the Act "to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce." Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14874, October 18, 1949. As stated by Representative Lesinski, Chairman of the House Committee, "the amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the Act as it has been interpreted by the courts in the past." 95 Cong. Rec. 14,942, October 18, 1949.[7]

Specifically, the change in the definition of "produced" was not intended to exclude from the Act cookhouse employees of the type involved here and in the

[7] This is not to state that the 1949 Amendments constituted a blanket endorsement of the previous applications of the Act to the multifarious situations which had confronted the courts. See the Statement of the House Managers which contains an illustrative list of decisions applying the Act to activities which Congress considered "not closely related or directly essential to production." 95 Cong. Rec. 14929, October 18, 1949. See also Interpretative Bulletin issued May 1950 by the Wage and Hour Administrator

Womack and *Hanson* cases. This is made clear (1) by rejection of the word "indispensable" as being too restrictive,[8] (2) by express approval of the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees, (3) by the choice of language, virtually identical to the Supreme Court's language in *Kirschbaum,* and (4) by statements in both branches of Congress expressly approving the *Kirschbaum* case.

The Report of the Majority of the Senate Conferees makes it clear that employees of the type here involved were not intended to be removed from the protection of the Act. It states:

> What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities

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concerning the general coverage of the amended Act. Title 29, Ch. V, Code of Federal Regulations, Part 776, Subpart A; 15 F. R. 2925.

[8] 95 Cong. Rec. 14874, October 18, 1949. See also 95 Cong. Rec. 14936, October 18, 1949.

> directly essential to production does not, as did the House Bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings (95 Cong. Rec. 14874, October 18, 1949).

After pointing out that coverage of a real estate firm's employees could not be predicated on the rental of living quarters to factory workers, the Report continues:

> * * * Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in *Consolidated Timber* v. *Womack,* 132 F. 2d 101 (C. A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 180 (C. A. 8); *Basik* v. *General Motors Corp.* (Mich. Sup. Ct.), 19 N. W. 2d 142. *Ibid.*

The House Conference Report does not mention the above cases, but states:

> * * * Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (*McComb* v. *Factory Stores,* 81 F. Supp. 403 (N. D. Ohio, 1948)). Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc. activity * * * (95 Cong. Rec. 14928, October 18, 1949).

A close comparison of the language of these two reports and an appreciation of the Congressional intent to provide a clearer guide for judicial determination plainly reveals the line of distinction to be drawn in this area of industrial feeding. The House Report was concerned with the typical situation where a restaurant is located in a factory, which is substantially indistinguishable from any neighboring restaurant to which factory workers would have access. The Senate Report, on the other hand, specifically contemplated the situation presented here to this Court, "where living facilities such as food and lodging are provided as a means of assuring continued and efficient production" (95 Cong. Rec. 14874, October 18, 1949). An examination of the facts in the instant case leaves little question that the facilities were provided here as a means of assuring continued production. The type of operation here conducted is not that of the "independently owned and operated restaurant

located in a factory" which the House Conference Report referred to as no longer being within the coverage of the Act. The facilities here involved were operated by the Anaconda Company, itself, prior to 1945 (Fdg. 2, R. 54). Under the "subsistence agreement" entered into on that date with appellees, and as amended, the messhall, bunkhouses, light, heat, fuel, and telephone service are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. In addition, appellees are guaranteed a gross profit of $750 each month (Plf. Exhs. A and B). Further, the "subsistence agreement" stipulates the charges to be made for board and lodging and requires the operator to serve wholesome daily meals as directed by the Company (Plf. Exh. B, R. 42). Appellees are granted the exclusive privilege of conducting "subsistence operations" at the mine during the continuance of the agreement which may be terminated upon 30 days written notice by either party (Plf. Exh. B, R. 41). Under these circumstances it can hardly be contended that the facilities here in question constitute an "independently owned and operated restaurant." Rather, one cannot escape the conclusion that the facilities are provided "as a means of assuring continued and efficient production" within the intent of the Senate Conference Report (95 Cong. Rec. 14874, October 18, 1949).

Nor is it material under the amendments that the services are provided through an independent contractor rather than by the interstate producer as was true in the *Womack* case. For the House Managers

stated that employees such as those held covered in *Kirschbaum,* "will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce" (95 Cong. Rec. 14929, October 18, 1949). And the Report of the Majority of the Senate Conferees, after giving specific approval to the *Womack* and *Hanson* decisions and after enumerating several other categories of employees who remain within the coverage of the Act, stated: "* * * The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14874–5, October 18, 1949).

That the ruling in *Kirschbaum* continues as authoritative under the amended definition was made plain in both branches of Congress. Thus, the Managers on the Part of the House explained in their statement accompanying the Conference Report on the bill as enacted:

> The bill as agreed to in conference does not affect the coverage under the Act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum* v. *Walling,* 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. * * * All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for

> commerce. (95 Cong. Rec. 14929, October 18, 1949.)

The Report of the Majority of the Senate Conferees also specifically approved the *Kirschbaum* case. Thus, it states:

> Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of Section 3 (j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer:
>
> * * * * *
>
> 2. Employees repairing, maintaining, improving, or enlarging the buildings, equipment or facilities of producers of goods. *Roland Electric Co.* v. *Walling* (326 U. S. 657); *Kirschbaum* v. *Walling* (316 U. S. 517); *Walling* v. *McCrady Construction Co.* (156 F. 2d 932 (C. A. 3)); *Borden Co.* v. *Borella* (325 U. S. 679); *Walling* v. *Mid-Continent Pipe Line Co.* (143 F. 2d 308 (C. A. 10)); *Bowie* v. *Gonzales* (117 F. 2d 11 (C. A. 1)); *Bozant* v. *Bank of New York* (156 F. 2d 757 (C. A. 2)).
>
> * * * * *
>
> The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer (95 Cong. Rec. 14874–5, October 18, 1949).

The work of the cookhouse employees is not unlike that of the maintenance employees in *Kirschbaum.*

Indeed this Court in the *Womack* case and the Eighth Circuit in the *Hanson* case recognized this similarity by basing their decisions squarely on the authority of *Kirschbaum* v. *Walling,* 316 U. S. 517. And in *General Electric Co.* v. *Porter,* 208 F. 2d 805 (December 7, 1953) certiorari denied 347 U. S. 951, this Court only recently had occasion to reaffirm its approval of *Kirschbaum,* stating:

> * * * In *Borden Company* v. *Borella,* 1945, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, the Supreme Court not only reaffirmed its position in the *Kirschbaum* case but extended it (*id.* at 810).
>
> * * * While *Borden Company* v. *Borella,* 1945, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, was decided prior to the 1949 amendments to the Act, the logic of that opinion still applies to the instant case. The legislative history, interpretations of the Administrator of the Wage and Hour Division, and court decisions convince us that the employees such as here involved were not removed from the coverage of the Act by the amendments. *Tobin* v. *Union Nat. Bank of Little Rock,* D. C. Ark. 1953, 112 F. Supp. 702; 15 Federal Register 2925, Section 776.17, 776.18; Statement of the Managers on the Part of the House, H. R. Report No. 1453, 81st Congress, 1st Session, Oct. 17, 1949 (*id.* at 811).

Other court decisions subsequent to the 1949 Amendments have consistently recognized that the coverage of cookhouse employees of the type here involved and maintenance and custodial employees of producers of goods for commerce has remained unchanged. See

Hawkins v. *E. I. DuPont de Nemours & Co.,* 192 F. 2d 294 (C. A. 4, 1951) discussed *supra* at p. 27; *Tobin* v. *Promersberger,* 104 F. Supp. 314 (D. Minn., 1952); *Tobin* v. *Cherry River Boom & Lumber Co.,* 102 F. Supp. 763 (S. D. West Virginia, 1952); *Broach* v. *McPherson,* 248 S. W. 2d 355 (S. Ct. of Arkansas, 1952); *Tobin* v. *Union Nat. Bank of Little Rock,* 207 F. 2d 848 (C. A. 8); *General Electric Co.* v. *Porter,* 208 F. 2d 805 (C. A. 9), certiorari denied, 347 U. S. 951; *Russell Co.* v. *McComb,* 187 F. 2d 524 (C. A. 5).

In the *Promersberger* case, *supra,* which held that operations in logging camps of cooks, cookees, bull cooks, barn boss, watchman, and clerk, were closely related to and directly essential to the production of goods for commerce. The court stated at page 317:

> Defendants cite legislative history to the effect that restaurant employees were not intended to be within Section 3 (j) of the Act. But it is obvious that the legislators making the comments cited by defendants were speaking of the usual, common situations, not of those cases which, like the instant case, are not the usual, prevalent variety. The legislative history aptly shows that the principle of *Kirschbaum Co.* v. *Walling, supra,* was not destroyed by the amendment.
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> * * * * *
>
> The bull cooks of the Promersberger camp and the Johnson camp also are within the Act in view of their relationships to the cookhouse, and the similarity of their duties to those of some of the employees involved in the *Kirschbaum* case. (*Ibid*)

Similarly, in *Tobin* v. *Cherry River Boom & Lumber Co., supra,* the court held that cookhouse employees were within the coverage of the Act citing this Court's decision in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101; *Hawkins* v. *E. I. du Pont de Nemours & Co.,* 192 F. 2d 294; and *Hanson* v. *Lagerstrom,* 133 F. 2d 120.

It therefore seems overwhelmingly clear that *Womack, Hanson* and *Kirschbaum* are still authoritative decisions under the 1949 Amendments of the Act.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. Supp. V, 201 *et seq.*):

Section 3 (j) prior to amendment:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 3 (j) as amended:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.
>
> SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of

his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of

the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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